

HOUSE BILL NO. 626

INTRODUCED BY C. KAUFMANN

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A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING A SHORT-TERM LEASE OF APPROPRIATION RIGHT TO MAINTAIN INSTREAM FLOW FOR FISHERIES PROTECTION, SUBJECT TO CERTAIN REQUIREMENTS; AMENDING SECTIONS 85-2-102, 85-2-122, AND 85-2-410, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. (Temporary) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

- (a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water;
- (b) in the case of a public agency, to reserve water in accordance with 85-2-316;
- (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436;

or

(d) in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery resource in accordance with 85-2-439; or

(e) to maintain instream flow for fisheries protection pursuant to 85-2-410.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; or

(d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper



1 Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized under
2 85-2-439.

3 (3) "Certificate" means a certificate of water right issued by the department.

4 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
5 purpose of use, or the place of storage.

6 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

7 (6) "Correct and complete" means that the information required to be submitted conforms to the
8 standard of substantial credible information and that all of the necessary parts of the form requiring the
9 information have been filled in with the required information.

10 (7) "Declaration" means the declaration of an existing right filed with the department under section 8,
11 Chapter 452, Laws of 1973.

12 (8) "Department" means the department of natural resources and conservation provided for in Title 2,
13 chapter 15, part 33.

14 (9) "Developed spring" means any artificial opening or excavation in the ground, however made,
15 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
16 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
17 natural pressures or is artificially withdrawn.

18 (10) "Existing right" or "existing water right" means a right to the use of water that would be protected
19 under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water
20 rights created under federal law and water rights created under state law.

21 (11) "Ground water" means any water that is beneath the ground surface.

22 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of
23 abandonment under 85-2-226.

24 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
25 85-2-303 and 85-2-306 through 85-2-314.

26 (14) "Person" means an individual, association, partnership, corporation, state agency, political
27 subdivision, the United States or any agency of the United States, or any other entity.

28 (15) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district
29 created pursuant to state law or other public body of the state empowered to appropriate water.

30 (b) The term does not mean a private corporation, association, or group.

1 (16) "Salvage" means to make water available for beneficial use from an existing valid appropriation
2 through application of water-saving methods.

3 (17) "State water reservation" means a water right created under state law after July 1, 1973, that
4 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
5 throughout the year or at periods or for defined lengths of time.

6 (18) "Substantial credible information" means probable, believable facts sufficient to support a
7 reasonable legal theory upon which the department should proceed with the action requested by the person
8 providing the information.

9 (19) "Waste" means the unreasonable loss of water through the design or negligent operation of an
10 appropriation or water distribution facility or the application of water to anything but a beneficial use.

11 (20) "Water" means all water of the state, surface and subsurface, regardless of its character or manner
12 of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

13 (21) "Water division" means a drainage basin as defined in 3-7-102.

14 (22) "Water judge" means a judge as provided for in Title 3, chapter 7.

15 (23) "Water master" means a master as provided for in Title 3, chapter 7.

16 (24) "Watercourse" means any naturally occurring stream or river from which water is diverted for
17 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

18 (25) "Well" means any artificial opening or excavation in the ground, however made, by which ground
19 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.
20 (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

21 **85-2-102. (Effective July 1, 2005) Definitions.** Unless the context requires otherwise, in this chapter,
22 the following definitions apply:

23 (1) "Appropriate" means:

24 (a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water;

25 (b) in the case of a public agency, to reserve water in accordance with 85-2-316; ~~or~~

26 (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436;

27 or

28 (d) to maintain instream flow for fisheries protection pursuant to 85-2-410.

29 (2) "Beneficial use", unless otherwise provided, means:

30 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not

1 limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal,
2 power, and recreational uses;

3 (b) a use of water appropriated by the department for the state water leasing program under 85-2-141
4 and of water leased under a valid lease issued by the department under 85-2-141; and

5 (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under
6 85-2-436.

7 (3) "Certificate" means a certificate of water right issued by the department.

8 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
9 purpose of use, or the place of storage.

10 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

11 (6) "Correct and complete" means that the information required to be submitted conforms to the
12 standard of substantial credible information and that all of the necessary parts of the form requiring the
13 information have been filled in with the required information.

14 (7) "Declaration" means the declaration of an existing right filed with the department under section 8,
15 Chapter 452, Laws of 1973.

16 (8) "Department" means the department of natural resources and conservation provided for in Title 2,
17 chapter 15, part 33.

18 (9) "Developed spring" means any artificial opening or excavation in the ground, however made,
19 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
20 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
21 natural pressures or is artificially withdrawn.

22 (10) "Existing right" or "existing water right" means a right to the use of water that would be protected
23 under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water
24 rights created under federal law and water rights created under state law.

25 (11) "Ground water" means any water that is beneath the ground surface.

26 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of
27 abandonment under 85-2-226.

28 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
29 85-2-303 and 85-2-306 through 85-2-314.

30 (14) "Person" means an individual, association, partnership, corporation, state agency, political

1 subdivision, the United States or any agency of the United States, or any other entity.

2 (15) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district
3 created pursuant to state law or other public body of the state empowered to appropriate water.

4 (b) The term does not mean a private corporation, association, or group.

5 (16) "Salvage" means to make water available for beneficial use from an existing valid appropriation
6 through application of water-saving methods.

7 (17) "State water reservation" means a water right created under state law after July 1, 1973, that
8 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
9 throughout the year or at periods or for defined lengths of time.

10 (18) "Substantial credible information" means probable, believable facts sufficient to support a
11 reasonable legal theory upon which the department should proceed with the action requested by the person
12 providing the information.

13 (19) "Waste" means the unreasonable loss of water through the design or negligent operation of an
14 appropriation or water distribution facility or the application of water to anything but a beneficial use.

15 (20) "Water" means all water of the state, surface and subsurface, regardless of its character or manner
16 of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

17 (21) "Water division" means a drainage basin as defined in 3-7-102.

18 (22) "Water judge" means a judge as provided for in Title 3, chapter 7.

19 (23) "Water master" means a master as provided for in Title 3, chapter 7.

20 (24) "Watercourse" means any naturally occurring stream or river from which water is diverted for
21 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

22 (25) "Well" means any artificial opening or excavation in the ground, however made, by which ground
23 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.
24 (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

25 **85-2-102. (Effective July 1, 2009) Definitions.** Unless the context requires otherwise, in this chapter,
26 the following definitions apply:

27 (1) "Appropriate" means:

28 (a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water; ~~or~~

29 (b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

30 (c) to maintain instream flow for fisheries protection pursuant to 85-2-410.

- 1 (2) "Beneficial use", unless otherwise provided, means:
- 2 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not
- 3 limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal,
- 4 power, and recreational uses; or
- 5 (b) a use of water appropriated by the department for the state water leasing program under 85-2-141
- 6 and of water leased under a valid lease issued by the department under 85-2-141.
- 7 (3) "Certificate" means a certificate of water right issued by the department.
- 8 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
- 9 purpose of use, or the place of storage.
- 10 (5) "Correct and complete" means that the information required to be submitted conforms to the
- 11 standard of substantial credible information and that all of the necessary parts of the form requiring the
- 12 information have been filled in with the required information.
- 13 (6) "Declaration" means the declaration of an existing right filed with the department under section 8,
- 14 Chapter 452, Laws of 1973.
- 15 (7) "Department" means the department of natural resources and conservation provided for in Title 2,
- 16 chapter 15, part 33.
- 17 (8) "Developed spring" means any artificial opening or excavation in the ground, however made,
- 18 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
- 19 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
- 20 natural pressures or is artificially withdrawn.
- 21 (9) "Existing right" or "existing water right" means a right to the use of water that would be protected
- 22 under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water
- 23 rights created under federal law and water rights created under state law.
- 24 (10) "Ground water" means any water that is beneath the ground surface.
- 25 (11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of
- 26 abandonment under 85-2-226.
- 27 (12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
- 28 85-2-303 and 85-2-306 through 85-2-314.
- 29 (13) "Person" means an individual, association, partnership, corporation, state agency, political
- 30 subdivision, the United States or any agency of the United States, or any other entity.

1 (14) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district
2 created pursuant to state law or other public body of the state empowered to appropriate water.

3 (b) The term does not mean a private corporation, association, or group.

4 (15) "Salvage" means to make water available for beneficial use from an existing valid appropriation
5 through application of water-saving methods.

6 (16) "State water reservation" means a water right created under state law after July 1, 1973, that
7 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
8 throughout the year or at periods or for defined lengths of time.

9 (17) "Substantial credible information" means probable, believable facts sufficient to support a
10 reasonable legal theory upon which the department should proceed with the action requested by the person
11 providing the information.

12 (18) "Waste" means the unreasonable loss of water through the design or negligent operation of an
13 appropriation or water distribution facility or the application of water to anything but a beneficial use.

14 (19) "Water" means all water of the state, surface and subsurface, regardless of its character or manner
15 of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

16 (20) "Water division" means a drainage basin as defined in 3-7-102.

17 (21) "Water judge" means a judge as provided for in Title 3, chapter 7.

18 (22) "Water master" means a master as provided for in Title 3, chapter 7.

19 (23) "Watercourse" means any naturally occurring stream or river from which water is diverted for
20 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

21 (24) "Well" means any artificial opening or excavation in the ground, however made, by which ground
22 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."
23

24 **Section 2.** Section 85-2-122, MCA, is amended to read:

25 **"85-2-122. Penalties.** (1) A person who violates or refuses or neglects to comply with the provisions
26 of this chapter, any order of the department, or any rule of the department is guilty of a misdemeanor.

27 (2) Except as provided in 85-2-410(6), a person who violates or refuses or neglects to comply with the
28 provisions of 85-2-114, any order of the department, or any rule of the department is subject to a civil penalty
29 not to exceed \$1,000 per violation. Each day of violation constitutes a separate violation.

30 (3) (a) Except as provided in subsection (3)(b), fines collected by the department or a district court under

1 subsection (2) must be deposited in the account established in 85-2-318 for use by the department in the
2 enforcement of 85-2-114.

3 (b) If a fine is collected by an independent action brought by the county attorney, the fine must be
4 deposited in the general fund of the county."

5

6 **Section 3.** Section 85-2-410, MCA, is amended to read:

7 **"85-2-410. Short-term lease of appropriation right.** (1) An appropriator may lease all or part of an
8 appropriation right for a term not to exceed 90 days ~~all or part of an appropriation right for road construction or~~
9 ~~dust abatement~~ without the prior approval of the department, subject to the requirements of this section, for the
10 following purposes:

11 (a) road construction;

12 (b) dust abatement; or

13 (c) to maintain instream flow for fisheries protection;

14 (i) when the drought advisory committee created in 2-15-3308 declares a drought alert or severe
15 drought status in the county in which the stream is located; or

16 (ii) when necessary to mitigate localized stream dewatering.

17 (2) The lease agreement must include the following information:

18 (a) the name and address of the lessee;

19 (b) the name of the owner of the appropriation right;

20 (c) the number of the appropriation right;

21 (d) the purpose of use of water for which the lease is being made;

22 (e) the source of water to be appropriated;

23 (f) the starting and ending date of the proposed use of water;

24 (g) if applicable, the proposed point of diversion;

25 (h) if applicable, the proposed place of use;

26 (i) the ~~diversion~~ flow rate and volume of water to be used during the period of use; and

27 (j) a description of how the existing use of water will be reduced to accommodate the temporary change
28 of use of the appropriation right, including the number and location of acres to be removed from irrigation, if
29 applicable.

30 ~~(2)(3)~~ (a) Except as provided in subsection (3)(b), a short-term lease of an appropriation right under

1 this section may not exceed 60,000 gallons a day or the amount of the appropriation right, whichever is less. Any
 2 combination of short-term leases ~~cannot~~ may not exceed 120,000 gallons a day for one project.

3 (b) A short-term lease of an appropriation right to maintain instream flow for fisheries protection may
 4 not exceed 5 cubic feet per second or the amount of the appropriation right, whichever is less. A combination
 5 of short-term leases on a single stream may not exceed 10 cubic feet per second.

6 ~~(3)~~(4) The following information must be submitted to the department at least 2 days prior to the use
 7 of water by a lessee under this section:

8 (a) a copy of the publication notice or copies of the individual notice required under subsection (4);

9 (b) a copy of the lease agreement; and

10 (c) for a combination of short-term leases greater than 60,000 gallons a day for one project, an analysis
 11 by the lessee of any potential adverse effects and a description of planned actions to mitigate any potential
 12 adverse effects to appropriators in the area of the proposed point of diversion.

13 ~~(4)~~(5) The lessee of an appropriation right under this section shall, 30 days prior to the use of the water,
 14 publish a notice of the proposed use of water once in a newspaper of general circulation in the area of the
 15 diversion or mail individual notice to potentially affected appropriators in the area of the proposed point of
 16 diversion or the existing point of diversion if the lease is to maintain instream flow. The published notice or the
 17 individual notice must contain the information listed in subsections ~~(1)(a) through (1)(j) and (3)(c)~~ (2) and (4)(c).

18 ~~(5)~~(6) (a) The owner of a water right, whether the right is prior or subsequent in priority to the short-term
 19 lease acquired by a person under this section, who cannot satisfy in full the owner's right during the time that
 20 the short-term lessee is ~~diverting~~ appropriating water may make a complaint to the department and cause the
 21 short-term lessee's ~~diversion~~ appropriation to be discontinued.

22 (b) The ~~diversion~~ appropriation is discontinued until the owner's right is satisfied or until the lessee
 23 establishes to the department that the discontinuance has had no effect on the owner's water right. Upon
 24 establishment that discontinuance has not had an effect, the department shall enter an order allowing the
 25 ~~diversion~~ appropriation to continue.

26 ~~(6)~~(7) If a person purposely, with malicious intent, causes the discontinuance of a short-term ~~diversion~~
 27 lease through the complaint process provided in subsection ~~(5)(a)~~ (6)(a) and the complaint is found to be invalid
 28 and frivolous, the person is, upon conviction, guilty of a misdemeanor and shall be fined in an amount not to
 29 exceed \$500.

30 ~~(7)~~(8) This section does not limit the remedies available to an appropriator to enjoin or to seek damages

1 from a person appropriating water under this section.

2 ~~(8)(9)~~ A civil action instituted to enjoin or seek damages from a person appropriating water pursuant
3 to this section must be commenced against the lessee. The lessor is not a necessary party to a civil action. The
4 lessee has the burden of establishing that the lessee's use does not have an adverse effect on a prior
5 appropriator of water."

6

7 NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

8

- END -